



U.S. Department of Justice

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June 11, 1992

**VIA FAX THEN OVERNIGHT MAIL**

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Re: United States v. NL Industries, Inc., et al.  
Civ. No. 91-578-JLF  
DOJ # 90-11-3-608A

Dear Counsel:

We are in receipt of the individual notices of deposition of (1) Brad Bradley, U.S. EPA, (2) MaryAnn Croce LaFaire, U.S. EPA, and (3) Jo Lynn Traub, U.S. EPA. We also have the two Rule 30(b)(6) notices of deposition requesting testimony on (1) U.S. EPA's selection of remedial action on the soil cleanup levels,

EPA Region 5 Records Ctr.



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and (2) U.S. EPA's procedures for providing notice and comment. This letter is to inform you, in addition to our conversation today by telephone, that the United States objects to these depositions on several grounds and therefore will not produce these people for deposition at this time.

First, as you know, the United States has recently filed a Motion for a Ruling on The Appropriate Scope and Standard of Review of Agency Action and for a Protective Order Limiting Discovery. Your attempt to take discovery, in light of the United State's motion for a protective order, is improper. The United States' motion sets forth our position on the propriety of discovery in this case. Simply, as set forth more fully in that motion, no discovery is appropriate unless certain extraordinary circumstances are presented.

Furthermore, the United States has briefed the very issues concerning public notice and comment. The only claim you attempted to make in your memorandum in response to the United States' motion is that U.S. EPA did not send the proposed plan to all the defendants. Because it is clear that all defendants were given adequate notice and an opportunity to comment on U.S. EPA's proposed remedial action, your bald assertion does not present a genuine issue of material fact that would preclude the Court from following CERCLA and limiting judicial review to the administrative record.

Second, according to the First Case Management Order ("FCMO"), the parties were to "develop a deposition scheduling plan within fifteen (15) days following certification of the administrative record." FCMO at 4. On April 8, 1992, I initiated a call to the parties in order to comply with the FCMO. During that call, it was agreed by all the parties that fact depositions would proceed during the weeks of May 18, May 25, and June 1, 1992. It was also agreed that the parties would provide notice of their intended depositions by the following week. On April 15, 1992, the United States sent Rule 30(b)(6) notices of deposition to all defendants. Those 30(b)(6) notices requested testimony on notice issues. Until yesterday, we had not received your notices, even after informing you, on several occasions, that you were in violation of the FCMO. See the United States' May 1, 1992 letter to you. You have not complied with the FCMO and have failed to preserve the taking of your depositions within the agreed times.

Third, the certificate of service on the individual deposition notice to Brad Bradley, MaryAnn Croce LaFaire, and Jo Lynn Traub lists yesterday, June 10, 1992, as the service date, while the notice requests the presence of these people on June 4, 1992. This is nothing more than a transparent attempt to correct your clear violation of the FCMO. Just this afternoon we

received your duplicative notice of deposition of these same people, now scheduled for June 15, 1992. This second notice does not detract from your patent posturing.

Fourth, the Rule 30(b)(6) deposition notices are scheduled for the last day of fact deposition, June 15, 1992, under the FCMO. We don't know why you have waited so long, until two working days before the end of fact deposition discovery, to notice these depositions.

Fifth, you have asked for documents as part of these depositions without complying with Rule 34. According to Rule 30(b)(5), a request for documents accompanied with a notice of deposition must comply with Rule 34. Rule 34 allows for 30 days in which to produce documents without leave of Court. You have not, to date, sought such leave.

Sixth, the notice of deposition of Ms. Jo Lynn Traub is particularly unsettling. As you are well aware, U.S. EPA, as well as representatives of the defendants and intervenors were invited to participate in a public hearing held on June 9, 1992 before the United States Congress, House of Representatives, Public Works and Transportation Committee, Subcommittee on Investigations and Oversight. U.S. EPA's Region V representative at the hearing, Ms. Traub, merely provided the Subcommittee with the history of the NL Site, as more fully set forth in the Administrative Record, and she made it perfectly clear that she was not prepared to answer questions or go into matters that are the subject of this litigation.

Furthermore, after reviewing the Administrative Record, I was unable to locate any reference to Ms. Traub. It is incomprehensible how you can now request her deposition. Surely the issues presented in this case should be decided by, and not be politically usurped from, the Court.

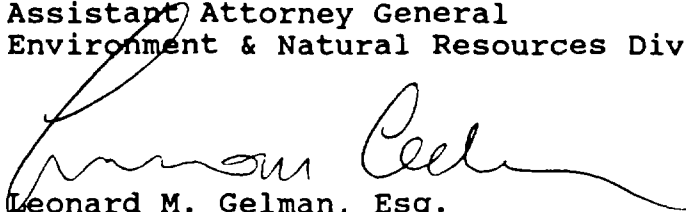
Finally, with respect to the subpoena of IDPH records, pursuant to the agreement with Joe, no action would be taken with respect to this subpoena until we heard back from him this morning. Apparently, after today's phone call, representatives of Joe's firm had already recovered the documents from IDPH. We do not agree with your actions. Your eleventh hour scramble for information and depositions, coupled with the slow delivery of mail, has made it difficult if not impossible for us to object to your discovery. Because we have the right to object to such discovery, your actions are in violation of the letter and spirit of the Federal Rules of Civil Procedure. Notwithstanding, Joe has agreed to provide the United States with copies of all documents recovered from IDPH and we look forward to receiving those documents. As for the deposition of Tom Long, you have

agreed not to take this deposition until further notice to the United States.

If you have any questions, please feel free to call me or Kevin Holewinski at (202) 514-5415.

Sincerely,

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